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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 479

PIERCE BROTHERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below enforcing the order of the Board (R. 198-201), is reported at 206 F. 2d 569. The findings of fact, conclusions of law, and order of the Board (R. 59-63, 22-57) are reported at 97 NLRB 317.

JURISDICTION

The decree of the court below (R. 201-207) was entered on September 16, 1953. The petition for a writ of certiorari was filed on November 25, 1953.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner's operations bring it within the coverage of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the petition, pp. 1-6.

STATEMENT

I. *The Board's findings and order*—Petitioner, a California corporation, is engaged in the undertaking business with its offices and principal mortuary in Los Angeles, California (R. 26; 11-12). Handling more cases than any of its competitors in Los Angeles County, petitioner operates 15 mortuaries in that County and employs 207 persons, 40 of whom are embalmers and apprentice embalmers (R. 26; 12).

During the 12-month period ending March 31, 1951, petitioner purchased capital equipment, materials, and supplies of a value of approximately $590,000 (R. 26; 13). Of this amount, approximately $7,500 worth was shipped to petitioner from points outside the State of California, and $45,000 worth, while purchased locally, was originally manufactured outside the State (R. 26; 13). During this same period, petitioner provided mortuary services in 5,780 cases and received $1,900,000 for

services rendered and supplies furnished for that purpose (R. 26; 13). Of this amount, the sum of $243,131.60 was received for services and supplies furnished in connection with 544 bodies which were shipped for burial outside the State of California (R. 27; 13-14, 20-21).[1] A breakdown of the $243,131.60 shows a charge of $27.200 for shipping cases, $142,424.04 for embalming and other services, and $73,507.56 for caskets (R. 27; 13-14, 20-21).

Petitioner's total receipts also included the sum of $42,611.22 received in payment for 178 cases in which, after the services of petitioner, the bodies were cremated by petitioner's wholly owned subsidiary, Pierce Brothers Crematorium, and the remains thereafter shipped out of the State of California (R. 27; 14). The Crematorium received for its services in these 178 cases the sum of $10,276.28, representing $9,041.88 for cremations and $1,234.40 for shipping boxes and expenses (R. 27; 14).

Finally, petitioner owns approximately 98 percent of the capital stock of Pierce Insurance Company, a California corporation doing a substantial interstate business in selling funeral insurance (R. 27-28; 16-17).[2] Petitioner's president and two of its vice presidents and assistant secretaries are officers of the insurance company (R. 28, n. 5; 21).

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[1] Transportation charges, which in most instances were advanced by clients and in turn paid over by petitioner to the carrier, have not been included above (R. 15-16).

[2] The Pierce Insurance Company is licensed to do business in several states and the Territory of Hawaii. During the year 1950, it did over $25,000 worth of business in each of the states of California, Missouri, and Washington, and over $20,000 worth in Hawaii (R. 28; 16).

While that company does not confine its insurance scheme to petitioner's mortuary alone or draw its employees exclusively from that source,[3] many of petitioner's employees are selling agents for the insurance company, and all of petitioner's employees are authorized to and do accept premium payments on Pierce Insurance Company policies (R. 28, 29; 16-17).

Upon the foregoing facts, the Board found that petitioner was engaged in commerce within the meaning of the Act and that it would effectuate the policies of the Act to assert jurisdiction over petitioner (R. 29-30, 60, n. 2).

In March 1951, during the course of a union organizing campaign, petitioner interrogated employees concerning union membership and activities, threatened employees with reprisals, including discharge, if they joined the union, and discharged 15 employees because of their union and concerted activities (R. 30-49, 60). Upon these facts, not challenged here or in the court below, the Board found that petitioner had violated Section 8(a)(1) and (3) of the Act (R. 48-49, 60).

The Board's order (R. 60-63) requires petitioner to cease and desist from the unfair labor practices found and from in any other manner interfering with the rights guaranteed its employees under Sec-

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[3] Pierce Insurance Company, operating in conjunction with petitioner and 60 other independent mortuaries, offers insured funerals through the facilities of the particular mortuary covered by the policy (R. 28-29; 16-17). Employees of other mortuaries also act as selling agents and/or collection agents for the insurance company (R. 29; 16-17).

tion 7 of the Act. Affirmatively, the Board's order requires petitioner to reinstate the discharged employees with back pay and to post appropriate notices.

II. *The decision of the court below*—The court below sustained the Board's jurisdiction over petitioner and enforced the Board's order in full (R. 198-201).

ARGUMENT

This is a companion case to *Forest Lawn Memorial-Park Association, Inc.* v. *National Labor Relations Board,* No. 438, this Term, pending upon petition for certiorari,[4] and presents the same question. Petitioner here, like the petitioner in No. 438, is engaged in the mortuary business in California, purchases either from local or out-of-state sources substantial quantities of equipment, materials and supplies which are manufactured outside the state, and furnishes in substantial quantities services and supplies, including caskets and shipping cases, in connection with the shipment of bodies to points outside the State of California (*supra,* pp. 2-3). In addition, petitioner here, unlike petitioner in No. 438, owns 98 percent of the stock of Pierce Insurance Company, which sells funeral insurance in a number of states; many of petitioner's employees are also selling agents of the insurance company, and all of petitioner's employees are authorized to and do accept premium payments on the insurance company's policies (*supra,* pp. 3-4).

Petitioner resists the Board's assertion of juris-

[4] The court below disposed of both cases in one opinion.

diction over its operations, and seeks review of the decision below, for virtually the identical reasons relied on by petitioner in No. 438. For the reasons stated in the Board's brief (pp. 5-10) in opposition to the petition in No. 438, to which we respectfully refer the Court, we believe that the decision below in this case is also correct and presents neither a conflict of decisions nor any substantial question warranting review. Moreover, petitioner's close and intimate relationship with the insurance company supplies additional support for the Board's exercise of jurisdiction in the instant case. Many of petitioner's employees perform services for the closely allied insurance company; work stoppages involving these employees as a result of industrial strife attributable to unfair labor practices would have an impact not only upon petitioner's interstate operations but also upon the operations of the insurance company whose business is of an interstate character. See *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643; *National Labor Relations Board* v. *Tri-State Casualty Insurance Co.,* 188 F. 2d 50, 51-52 (C.A. 10).[5]

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[5] There is no conflict on this aspect of the case between the decision below and *National Labor Relations Board* v. *Shawnee Milling Co.,* 184 F. 2d 57 (C.A. 10), cited by petitioner (Pet. 14). In that case, unlike the instant case, the two businesses were wholly separate and apart, there was no identity of agents and employees, and there was "nothing in the record or in the stipulated facts which would warrant a finding that a labor disturbance in the Pauls Valley Plant would have an impact upon the operations at the Shawnee Plant, or that the discontinuance of operations at Pauls Valley would cast an undue burden upon the operations of the plant at Shawnee." 184 F. 2d at 59.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1953.

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In the

UNITED STATES SUPREME COURT

October Term 1953

No. 479

PIERCE BROTHERS

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF NATIONAL FUNERAL DIRECTORS ASSOCIATION OF THE UNITED STATES, INC. AS AMICUS CURIAE

National Funeral Directors Association of the United States, Inc., a non-profit corporation, which is composed of more than twelve thousand independent Funeral Directors located in all forty-eight States of the Nation, and in Alaska, Hawaii and Puerto Rico, is filing this Brief with the consent of the Petitioner and the Respondent.

QUESTIONS PRESENTED

The question presented, to which this Amicus Curiae desires to direct this Brief is – "Does the Petitioner come within the provisions of the National Labor Relations Act as amended, insofar as Interstate Commerce is concerned?"

1. SUMMARY OF FACTS PERTAINING TO THE JURISDICTIONAL ISSUE.

The facts are well set out in the Petition for a Writ of Certiorari filed by the Petitioner herein.

2. WHY THE WRIT OF CERTIORARI SHOULD BE ALLOWED.

A. The shipping of bodies outside the State of California does not constitute "Interstate Commerce" within the meaning of the Act.

(1) The responsibility for and jurisdiction of the body ceases when the remains are delivered to the baggage agent of the carrier; consequently the Funeral Director performs no act in "Interstate Commerce."

(2) A dead human body does not constitute "property" in the normal sense of the word when we are thinking in terms of Interstate Commerce.

For hundreds of years, since the beginning of what we now know as Modern Law, it has been held that a dead human body is not "property" in any sense of the word.

In re *Wong Yung Quy on Habeas Corpus,* a case reported in *2 Fed. 624* it was held:

> "A corpse is not property, and the remains of human beings carried out of the State for burial in a foreign country are not exports within the meaning of the clause of the Constitution prohibiting the laying of imposts or duties by the State upon exports."

It was thus determined that a dead human body with its casket cannot be considered as property being exported, even when it is being carried outside the State.

In the case of *A. F. Hutchinson Land Company* v. *Whitehead Bros. Co.*, 217 N.Y.S. 413, 418, 127 Misc. 558, it was held:

> "There is no right of property in a dead body in the ordinary sense, but it is regarded as property so far as necessary to entitle next of kin to legal protection from violation or invasion of its place of burial."

See also *Northeast Coal Co* v. *Pickelsimer*, 68 S.W. 2d 760, 253 Ky. 11.

A dead body is not part of the assets of the estate.

O'Donnell v. *Slack*, 123 Cal. 285;
Enos v. *Snyder*, 131 Cal. 68, 63 P. 170;
Griffith v. *Charlotte, etc. R. Co.*, 23 S.C. 25.

It is not subject to replevin.

Keyes v. *Konkel*, 119 Mich. 550, 78 N.W. 649;
Buchanan v. *Buchanan*, 28 Misc. 261, 59 N.Y. Supp 810.

It is not property in a sense that will support discovery proceedings.

Danahy v. *Kellogg*, 70 Misc. 25, 126 N.Y. Supp 444.

It may not be held as security for funeral costs.

Jefferson County Burial Society v. *Scott*, 218 Ala. 354, 118 So. 644;
American Express Co. v. *Eppley*, 5 Ohio Dec. (Rep.) 337;
See also
Jones v. *Ashburnham*, 4 East 455, 102 Eng. Rep. 905;

Reg. v. *Fox,* 2 Ad. & El. (N.S.) 246, 114 Eng. Rep. 95;
Reg. v. *Scott,* 2 Q. B. 248, note b, 114 Eng. Rep. 97.

It cannot be withheld by an express company or returned to the sender, where shipped under a contract calling for cash on delivery.

American Express Co. v. *Eppley,* supra;
Pacific Exp. Co. v. *Gathwright,* 61 Tex. Civ. App. 587, 130 S.W. 1035.

It may not be the subject of a gift causa mortis.
Driscoll v. *Nicholls,* 71 Mass. 488.

It is not common law larceny to steal a corpse.

Toppin v. *Moriarty,* 59 N.J. Eq. 115, 44 Atl. 469;
Fox v. *Gordon,* (Pa.) 16 Phila. 185;
Hayne's Case, 12 Coke 113, 77 Eng. Rep. 1389.

Rights in a dead body exist ordinarily only for purposes of burial, and, except with statutory authorization, for no other purpose.

Southern Life & Health Ins. Co. v. *Morgan,* 21 Ala. App. 5, 105 So. 161;
Matter of Beekman St. (N.Y.), 4 Bradf. Surr. 503;
Long v. *Chicago, etc R. Co.,* 15 Okla. 512, 86 P. 289.

Since dead bodies do not constitute "property," the question might arise concerning the casket, clothing or other tangible items incident to the burial.

Funeral Directing is not a commercial business in the ordinary sense of the word; neither is the Funeral Director a "supplier." He solely renders a service. He can be

likened to the doctor, lawyer, dentist. The tangible items he uses in his profession are but incidental to the service he renders.

In the case of *Guthrie* v. *Weaver,* 1 Mo. App. 136, it was held that:

> "A coffin which, with the consent of all persons having any pecuniary interest therein, had been deposited in a grave for purposes of interment with a corpse enclosed within it, is no longer a subject of property."

Thus, when a Funeral Director administers embalming fluid to a dead body, or supplies it with a suit of clothes or a shroud, these are rendered in connection with the Funeral Director's professional services.

We thus respectfully contend that the Petitioner is not engaged in "interstate commerce" because he does not ship anything outside the State which can be legally claimed as "property," and even though it should be held that a dead human body and casket are "property" then the control and custody of the shipment ceases when the same have been delivered to the baggage agent of the carrier.

3. FUNERAL DIRECTORS AND EMBALMERS ARE "PROFESSIONAL MEN."

As "professional men" Funeral Directors and embalmers are exempt under the National Labor Relations Act as amended. *Title 29 F.C.A. par 152 (12)* of this Act provides as follows:

> "The term "professional employee" means — (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechani-

cal, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standarized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

Practically every State of the Union, including California, has a license law governing Funeral Directors and Embalmers which laws were placed on the books primarily to protect the public and to raise the standards and ethics of the Funeral Director and Embalmer.

These laws, many of which were drawn under the supervision of the General Counsel of National Funeral Directors Association of the United States, Inc., are patterned after the various State laws governing lawyers, doctors and dentists. They require extended courses of study, examination and licensing. Thus the California Law known as "The Funeral Directors and Embalmers Law, Business and Professions Code of Deering's California Codes," Article 1, § 7600 et seq. provides that the ap-

plicant for a Funeral Director's license, must be over twenty-one years of age, of good moral character and must be examined, and successfully pass the examination on —

1. Signs of death
2. Manner of determining death
3. Laws governing preparation, burial and disposal of dead human bodies and shipment thereof
4. Local health laws and regulations.
   (see paragraph 7622)

The conduct of his business is specifically regulated by rules and regulations promulgated by the State Board of Funeral Directors and Embalmers.

Embalmers are separately licensed. (Par. 7640.) Paragraph 7643 provides that the applicant for embalmer's license must:

1. Be over 21 years of age.
2. Of good moral character.
3. Furnish proof of completion of high school course or that he has been licensed and has practiced as an embalmer for three of the last seven years in another State or County and that such license was never suspended or revoked for unethical conduct.
4. Have completed two years apprenticeship under licensed embalmer in this State and practiced as such in an approved funeral establishment and assisted in the embalming of 100 human dead bodies; provided that one who has practiced embalming three of the last seven years in another State or county and never had license suspended or revoked shall serve only one year apprenticeship and shall have assisted in the embalming of 50 dead human bodies.

5. Complete course of nine months in approved embalming school on subjects set out in § 7646.

The subjects of examination are set forth in § 7646, which are as follows:

1 - Theory of embalming
2 - Anatomy, histology, embryology and dissection
3 - Pathology and bacteriology
4 - Hygiene, sanitation, health
5 - Chemistry, toxicology
6 - Restorative art
7 - Health laws and rules

Apprentice embalmers must, according to paragraph 7662 —

1 - Be over 18 years of age
2 - Of good character
3 - Furnish proof of high school completion *or* that he has practiced as an embalmer for three of last seven years in other state or county and his license was never revoked or suspended.

The Board may suspend or revoke licenses of Funeral Directors and Embalmers and apprentices after hearing. The stringency of this supervision is illustrated under Paragraph 7668 which provides as follows:

> "The Board may suspend or revoke certificate of apprenticeship when apprentice is found guilty after hearing, for the following acts or omissions:

a. Failure to devote full time to apprenticeship.
b. Failure to make reports as required to Board.
c. Absence from duty unauthorized.
d. Gross immorality.
e. On duty under influence of liquor.
f. Disobedience of orders of superior.

g. Violation of law or regulations of Board.
h. Soliciting business for funeral director or embalmer.
i. Fraud or misrepresentation.
j. Failure to pay fee.

Thus, in the eyes of the laws of California and the other States having licensing laws, and under *Title 29 F.C.A. paragraph 151 (12),* Funeral Directors and Embalmers assume the status of "professional men."

4. THE QUESTION OF WHETHER A FUNERAL DIRECTOR IS OR IS NOT IN "INTERSTATE COMMERCE" HAS BEEN DECIDED IN CASES OTHER THAN N.L.R.B. CASES.

A. Thus, under the *Motor Carrier Act of 1935 as Amended. Title 49 F.C.A., par. 301 et seq.,* it was held in 1938, *In the Matter of Maurice E. Newman of Dover, Delaware, Docket MC 18962,* by the Interstate Commerce Commission after a thorough hearing, that the Funeral Director was not engaged in Interstate Commerce, and this notwithstanding the fact that a substantial part of his equipment, caskets and fluids had been purchased outside the State of Delaware, and that about three percent of his visits in carrying on his business as a Funeral Director brought him into another State. See also case of *Union Funeral Service of Gillespie, Illinois, I. C. No. M C 67243.*

B. *Federal Wage and Hour Law.*
(Fair Labor Standards Act)
Title 29 F.C.A. Chapter 8, par 201 et seq.

Under this Act the Funeral Director is exempt as a Service Establishment, the greater part of whose selling or servicing is in intrastate commerce.

Title 29, par. 213 Exemptions (a) provides in part as follows:

> "The provisions of Sections 6 and 7 (pars. 206, 207 of this title) shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

C -*The Social Security Act as amended, Title 42, par. 411 (c) (5)* excludes self employed funeral directors, placing them in the same category as physicians, lawyers, dentists and other professional men.

Title 42 F.C.A. par 411, Self-Employment (c) Trade or Business.

> "The term "trade or business", when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in Section 23 of the Internal Revenue Code (26:23) except that such term shall not include —
>
> (1) The performance of the functions of a public office;
>
> (2) The performance of service by an individual as an employee (other than service described in Section 210 (a) (16) (B) [par. 410 (a) (16) (B) of this title] performed by an individual who has attained the age of eighteen;)
>
> (3) The performance of service by an individual as an employee or employee representative as defined in Section 1532 of the Internal Revenue Code (26:1532);

(4) The performance of service by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(5) The performance of service by an individual in the exercise of his profession as a physician, lawyer, dentist, osteopath, veterinarian, chiropractor, naturopath, optometrist, Christian Science practitioner, architect, certified public accountant, accountant registered or licensed as an accountant under State or Municipal law, full-time practicing public accountant, funeral director, or professional engineer; or the performance of such service by a partnership.

During the writer's more than forty years practice of the law — and particularly as United States Attorney for the Southern District of Ohio under the Wilson Administration — we saw attempts by various governmental agencies in the administrative or executive branch, to extend their jurisdiction by amending by regulation or rule, the statutes under which they operated, yet never have we seen such an attempt as the National Labor Relations Board has been making during the past few years, even though, as stated above, every other governmental agency has held the average funeral director to be not engaged in interstate commerce — and this, even though in a case before the Interstate Commerce Commission, a part of the actual funeral service rendered, went across a state line into another State.

Not only is the National Labor Relations Board, in our opinion, attempting to improperly extend its jurisdiction by arbitrary rulings and formulae, but they are going counter to every other governmental agency and therefore,

every Act of Congress under which these other governmental bodies operate. As an example, take the Fair Labor Standards Act, which expressly exempts retail and service establishments under certain conditions. The funeral director is admittedly in the Service branch of endeavor.

In a very recent situation this Court held that professional baseball was still a sport and not a business even though it admittedly was in interstate commerce. We mention this because in our situation the National Labor Relations Board, in its attempt to obtain jurisdiction over another line of endeavor, is not only making Interstate out of Intrastate, but is endeavoring to take Funeral Services out of the service category.

As a matter of fact, if the average funeral director is subject to the jurisdiction of the National Labor Relations Board, then in our opinion, every corner drugstore and small retail establishment, every barber shop and other service enterprise, in fact, everybody is engaged in interstate commerce and should be subject to the supervision of the National Labor Relations Board. This I do not believe was ever intended by Congress or it would not have passed the laws creating the Federal Trade Commission, the Interstate Commerce Commission, the Wage and Hour Division, and others.

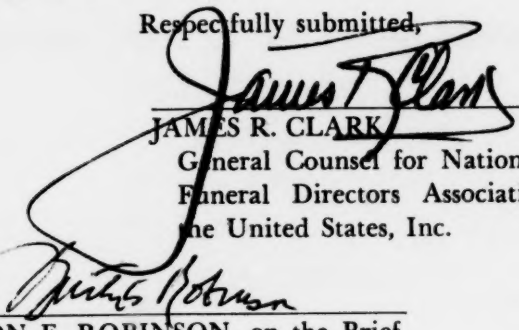
5. CONCLUSION

It is respectfully submitted for the reasons above set forth that the Court of Appeals has wrongfully held that the National Labor Relations Board had jurisdiction in this case, and its decision is of such far-reaching consequence that the Writ should be granted and that this Honorable

Court may once and for all time properly define the status of a Funeral Director and Embalmer insofar as the National Labor Relations Act is concerned.

Dated January 4, 1954.

Respectfully submitted,



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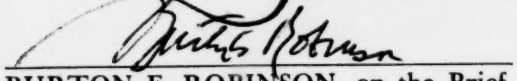

BURTON E. ROBINSON, on the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 479

PIERCE BROTHERS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF NATIONAL SELECTED MORTICIANS, INC., AS AMICUS CURIAE.

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QUESTION PRESENTED.

The question presented is whether a labor dispute in a mortician establishment affects interstate commerce within the meaning of the Commerce Clause of the Constitution and the National Labor Relations Act, as amended.

Facts Pertaining to the Jurisdictional Issue. The facts are well stated in the petition for a writ of certiorari filed by the petitioner herein.

Reasons Relied on for Allowance of the Writ. It is of national importance for this Court to decide whether federal jurisdiction under the Commerce Clause and the National Labor Relations Act, as amended, extends to the services of a mortician in the preparation and burial of dead bodies of human beings.

The services rendered by a mortician in preparing dead bodies for burial and supervising funerals have always been considered services of a wholly local nature; more so than the baseball exhibitions which this Court held to be "purely State affairs" in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs,* 259 U. S. 200, 208, and more so than vaudeville acts in *Hart* v. *B. F. Keith Vaudeville Exchange,* 12 F. 2d 341. In those cases it was held that the transportation across State lines was a mere incident, not the *essential thing.* Here the "essential thing" is the burial or other disposition of dead bodies which now, as at the time of the adoption of the Constitution, normally occurs where the deceased persons resided at death. In the early days "graves were crowded in the churchyard, and in the larger towns dead persons of dignity were buried, as in England, under the church." *Customs and Fashions in Old New England* (Charles Scribner's Sons, 1894) by Alice Morse Earle, page 380. Now our communities have cemeteries but the nature of the services performed by the undertaker

has remained the same. The "essential thing" bears no relation whatever to the basic grant to the federal government of power "to regulate Commerce with foreign Nations and among the several States * * *."

The nation is entitled to a definitive ruling from its highest tribunal as to whether such services, which heretofore have been traditionally regarded as among the most local of human activities, have finally come under the control of the federal government. Dead bodies of human beings are not articles of commerce, nor even property. Occasional delays in the burial of bodies could not threaten, obstruct or unduly burden commerce between the States. The bodies simply would be buried at some later date. The situation is unique and is not analogous to commercial ventures involving articles of trade.

The fact that as an incident to his services a mortician makes use of embalming fluid, caskets and packing cases which could be articles of trade, and do cross State lines, does not change the essential character of his occupation. In *Young* v. *Kellex Corporation,* 82 F. Supp. 953, the materials and equipment required in connection with the manufacture of the atomic bomb must have been enormous, yet federal jurisdiction under the Fair Labor Standards Act was denied because the atomic bomb was not an article of commerce. The incidental use of medicines and equipment did not mean that the practice of the healing arts was trade or commerce in *Spears Free and Clinic Hospital* v. *Cleere,* 197 F. 2d 125.

In considering the cases under the National Labor Relations Act this Court's opinion in the initial case, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, is informative. At pages 30-32 this Court said:

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinc-

tion, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

* * * * *

"The jurisdiction conferred upon the Board, and invoked in this instance, is found in § 10 (a), which provides:

'Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.'

"The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are 'affecting commerce.' The Act specifically defines the 'commerce' to which it refers (§ 2 (6)):

'The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.'

"There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term 'affecting commerce' (§ 2 (7)):

'The Term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.'

"This definition is one of exclusion as well as inclu-

sion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. See *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 570; *Schechter Corp.* v. *United States, supra,* pp. 544, 545; *Virginian Railway* v. *System Federation,* No. 40, 300 U. S. 515. It is the effect upon commerce, not the source of the injury, which is the criterion. *Second Employers' Liability Cases,* 223 U. S. 1, 51. Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise."

In *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, this Court upheld the jurisdiction of the National Labor Relations Board over a small manufacturing business, employing from 60 to 200 employees, where a product was regularly shipped in interstate commerce and said further that "* * * an employer may be subject to the National Labor Relations Act although not himself engaged in commerce. The end sought in the enactment of the statute was the prevention of the disturbance to interstate commerce consequent upon strikes and labor disputes induced or likely to be induced because of unfair labor practices named in the Act."

A test of the Board's jurisdiction is whether a stop-

page of an employer's operations on account of his labor difficulties would result in substantial interruption to or interference with the free flow of interstate commerce.

The Court below in the instant case (206 F. 2d 569, 571) said:

> "Respondents argue that their services and business are of a purely local nature not involving commerce, hence the Board is without jurisdiction in the premises. In *N. L. R. B.* v. *Hazen*, 9 Cir., 203 F. 2d 807, the employers charged with violations were engaged in the same character of business as here and were rendering the same sort of services, although on a smaller scale. In that case we thought the business and services were of such nature as to give the Board jurisdiction, and that the amount of the interstate business done was sufficient to avoid the *de minimis* rule. We are of like opinion here."

But the answer to the question here is in no way dependent upon the *de minimis* rule. On the contrary, the question raised here is whether commerce is involved in any degree whatever in the unique service of preparing dead bodies of human beings for burial or other disposition and in supervising funeral services.

Cases relied on by the National Labor Relations Board, such as *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675; *Local 74, United Brotherhood of Carpenters & Joiners* v. *National Labor Relations Board*, 341 U. S. 707, and *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, are clearly not in point since they involve commercial building construction, a subject matter closely related to trade and commerce.

There can be no interstate commerce by a mortician in the preparation of dead bodies of human beings for final disposition and in the supervision of funerals. The mortician's services no more affect interstate trade or commerce

than the services usually performed by a priest, minister, or rabbi over the dead body. His purchase of caskets, shipping cases and embalming fluids are purely incidental to his essential function. Actually there is a unique analogy here also in that those articles have the same destination as the dead bodies.

CONCLUSION.

The activities of Pierce Brothers did not constitute interstate commerce within the meaning of the Commerce Clause of the Constitution, nor affect interstate commerce within the meaning of the National Labor Relations Act as amended.

We respectfully ask that the Petition of Pierce Brothers for a Writ of Certiorari herein be allowed.

Dated February 6, 1954.

Respectfully submitted,

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